

A claimant hired as a part-time, on-call employee, whose hours vary from 25 to 38 hours per week was ineligible for benefits under the Mattapoissett exclusion. He was not in unemployment under G.L. c. 151A, sec. 1(r)(1) and 29(a), as nothing in his employment relationship had changed and he continued to work under the same terms.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits in weeks of less than full time work. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA for the week ending May 9, 2009, during a period of less than full-time work. The DUA issued a determination on June 23, 2009, disqualifying the claimant from receiving benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 14, 2009.

Benefits were denied after the review examiner determined that the claimant is an on call employee, and, therefore, disqualified, under G.L. c. 151A, §§ 29(b) and 1(r), during any week in which he works some hours for this employer, but less than a full time schedule. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence and make additional findings of fact. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision and consolidated findings of fact, and the claimant's appeal.

The issue on appeal is whether the claimant is an on-call worker, and therefore, not in partial unemployment or entitled to benefits in weeks of part-time work.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked as an on call transporter for the employer. The claimant began working for the employer on 5/15/96 and he is still employed.
2. The claimant is a union member. He, and other union employees, reports to the employer's work site every morning. The employer will then decide how many employees he needs to work that day. Once the employees are selected to work, the work is assigned to them by seniority. The employer will inform each employee how many hours they will be working.
3. When the employer initially hired the claimant, the terms and conditions of his employment were to report to see if work was available at 8am, 10am and 1:30pm. The claimant was hired as a casual worker who can drive up to 38 hours a week. The claimant is required to go to the work site daily at the above mentioned times to see if work is available. There were not subsequent changes in the claimant's employment status.
4. The days and hours that the employer operates its business each week is Monday through Friday from 8am until all of the work is done.
5. The claimant is required to report to the employer's work site once a week for three hours of work, unless no work is available. If no work is available, the claimant must report to the work site and sign in. The consequence for not meeting this requirement is loss of employment.
6. The claimant's understanding is that the employer does not employ full time transporters who have a regular schedule of work. All employees are casual workers who can drive a maximum of 38 hours a week. However, for the first time this summer, from May into part of September, the employer did select four casual workers to work a fixed part-time schedule. They worked between 11am to about 7pm assisting platinum customers. Since this part time work did not require driving, these four casual workers were also allowed to drive up to 38 hours driving time.
7. The claimant has more seniority than a little more than half of the 92 transporters. He is 37th in seniority.

8. The employer assigns work three times a day at 8am, 10am and 1:30pm. If the claimant is not selected to work at 8am he will return to the work site at 10am. If he is not selected to work at 10 am he will return to the work site at 1:30pm. The claimant does not receive any pay or other benefit if he reports to the employer and no work is available to him.

9. The claimant is frequently selected to work. His hours vary from 25 to 38 a week. In the last year of his employment, he earned over \$62,000.00.

10. The claimant did not know how many hours he worked for the employer during each of the weeks ending May 9, 2009 through July 4, 2009. The claimant did report to the work site every morning during these weeks to avail himself of work.

11. The claimant did not know the number of hours he worked during each month from the beginning of the base period of this claim, April 1, 2008 through April 30, 2009. The claimant did not know or have documentation showing the hours he worked during each of the weeks for which he has filed for unemployment, the week ending May 9, 2009 through the week ending July 4, 2009.

12. The claimant always accepts the hours that are offered.

13. The claimant also has a part time night job. He does security work at the [second employer] for special events. This part time job does not prevent the claimant from being available to work with the instant employer although he may have to restrict his hours of work on nights that he works at the [second employer].

14. The claimant's work with the instant employer is his primary job.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Under G.L. c. 151A, § 29(a)(b), individuals in either partial or total unemployment may receive unemployment benefits:

"Unemployed" and "Unemployment", an individual shall be deemed to be unemployed and in unemployment if either in "partial unemployment" or in "total unemployment" as defined in this subsection.

(a)...An individual in total unemployment and otherwise eligible for benefits ... shall be paid for each week of unemployment...

(b) An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed;

G. L. c. 151A, § 1(r), defines partial and total unemployment as follows, in relevant part:

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week;

...

(2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable of and available for work, he is unable to obtain any suitable work....

After the initial hearing, attended by both parties, the review examiner concluded that the claimant accepted a contract of employment to work on call, and that he is not in partial unemployment in weeks of less than full-time work, until there is a change in the contract of hire or severance. We remanded the case for clarification of the claimant's work history and relationship with this employer. The employer did not attend the remand hearing.

The consolidated findings clarify that the claimant was hired as a part-time, on-call employee, whose hours vary from twenty-five to thirty-eight hours per week. Nothing in his employment relationship has changed. He has continued to work for the employer under the same terms.

Not all individuals who work less than full-time hours are in partial unemployment. As the Supreme Judicial Court has stated:

To characterize [part-time, on-call] employees as 'partially unemployed' when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term ... The Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee.

Since the claimant is a part-time, on-call employee, his eligibility for benefits is dictated by the holding of Mattapoissett.

We, therefore, conclude as a matter of law that the claimant is not in partial unemployment, within the meaning of G.L. c. 151A, §§ 29(a)(b) or 1(r)(1)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending May 9, 2009 through the week ending July 4, 2009.

BOSTON, MASSACHUSETTS

DATE OF MAILING - August 6, 2010

/s/

Sandor J. Zapolin

Member

/s/

Stephen M. Linsky, Esq.

Member

Chairman John A. King, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT

(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – September 7, 2010

AB/jv

Last Updated (Friday, 16 March 2012)